

ETHICS ADVISORY COMMITTEE

STATE OF NORTH DAKOTA

OPINION 91-2

ISSUE

The issue addressed in this ethics opinion is who are the essential parties to the remittal of disqualification as the term "parties" is used in rule 3D of the North Dakota Rules of Judicial Conduct?

ANSWER

It is the Committee's opinion that the term "parties," as used in rule 3D of the North Dakota Rules of Judicial Conduct, should be interpreted to refer to persons who have a real, actual, material, or substantial interest in the subject matter of the action, namely, interested persons. We reach this decision in order to afford all parties due process of the law, to expedite final resolution of the issue, and to avoid the appearance of partiality. Due process and finality are also two of the primary justifications for providing subject matter notice to all interested persons. In most cases, the interested persons who must be given notice of a legal proceeding will be the same as the interested persons who must be given the opportunity to reject a remittal of disqualification. Thus, a judge may use the relevant notice statute to determine who are the essential parties to a remittal of disqualification.

Commentary

The response to this question is answered in the context of rule 3C(1)(d)(ii) of the North Dakota Rules of Judicial Conduct. Rule 3C(1)(d)(ii) provides, in relevant part:

C. Disqualification.

...

(1) A judge's disqualification is appropriate when the judge's impartiality might reasonably be questioned, including but not limited to instances where:

...

(d) a judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person

...

(ii) is acting as a lawyer in the proceeding;

N.D.R. Jud. Conduct 3C(1)(d)(ii) (1990). However, in accordance with rule 3D, the parties and the attorneys participating in the legal proceeding may waive this disqualification by signing a remittal of disqualification agreement.

In most circumstances, it is easy to determine who are the essential parties to a remittal of disqualification. However, in multi-party litigation proceedings, such as probate, it may be difficult and expensive to obtain the approval of all parties. Thus, is it necessary to determine who are the essential parties to the remittal of disqualification.

Because "[t]he fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citations omitted), the term "parties" should be interpreted to refer to all interested parties. An interested party or a real party in interest is "one who has a real, actual, material, or substantial interest in the subject matter of the action." 67A C.J.S. Parties § 18 (1978) (footnotes omitted). Since an interested person may be adversely affected by a judicial decision, that person is entitled to be heard and to contest a remittal of disqualification if he or she believes that a judge is biased in favor of an attorney to whom the judge is related.

The court's and parties' interest in resolution justifies interpreting the term "parties" to refer to interested persons. By allowing all interested parties to consent to the remittal of disqualification at the beginning of the proceedings, final resolution of the issue is insured.

The opportunity to consent or reject a remittal of disqualification is given to all interested persons for many of the same reasons that subject matter notice must be given to all interested persons. Thus, a judge may use the relevant notice statute to determine who are the essential parties to a remittal of disqualification.

Due process and finality, however, are not the only reasons why we interpret the term "parties" to include all interested parties. A family relationship between a judge and an attorney in a legal proceeding is usually considered to be improper. At minimum, there is an appearance of partiality. According to many legal scholars, the appearance of impropriety is as damaging as actual impropriety. Lubet, Judicial Ethics and Private Lives, 79 Nw. U.L. Rev. 983, 986 (1985).

Additionally, we interpret the term "parties" to include all interested parties because of the implied rule that when in doubt, a judge should disqualify herself. Stempfel, Rehnquist, Recusal, and Reform, 53 Brooklyn L. Rev. 589, 631 (1987); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1114 (5th Cir.), cert. denied, 449 U.S. 820 (1980). Thus, if the interpretation of "parties" presents any doubt, a judge should rule in favor of notifying all potentially named parties. Therefore, the term "parties" as it is used in rule 3D of the North Dakota Rules of Judicial Conduct is interpreted to refer to all interested persons.